Punj Lloyd Oil & Gas (M) Sdn Bhd v Etiqa Insurance Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1037–06 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND VARGHESE GEORGE JJCA
14 MARCH 2016

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Civil Procedure — Discontinuance — Leave to file fresh action — Appellant brought suit pursuant to insurance policy — Suit withdrawn by appellant with liberty to file afresh — Trial court allowed withdrawal but without liberty to file afresh — Whether court had discretion to strike off suit without liberty to file afresh — Whether learned judge's decision 'extremely harsh and unfair' — Whether application for adjournment genuine request

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This was the appellant's appeal against the learned judge decision in allowing the appellant's withdrawal of the suit against the respondents without liberty to file afresh. The appellant was involved in a project to construct the Sabah-Sarawak Pipeline awarded by Petronas Carigali Sdn Bhd. During the project, there was heavy rain occurred and Section 1 of the project was hit by severe floods which caused damage to the borehole and gravel access road at Sg Mengalong Crossing and the right of way at various locations and access roads in that areas. The respondents had agreed to insure the appellant for the project against any physical loss, damage, liability or expense under a construction all risks policy whereby the limits of liability or sums insured was 100%. The appellant submitted its claim to the respondents for the sum of RM13.989m pursuant to insurance policy. However, the respondents rejected the appellant's claim because respondents' loss adjusters Cunningham Lindsey Adjusters (M) Sdn Bhd had concluded that the appellant was not entitled to the RM13,989,887 claimed or any amount at all for the reasons contained in its preliminary report dated 8 July 2011 and final report dated 15 February 2012. Consequently, the appellant filed the suit against the respondents. At the commencement of the hearing, the learned judge heard the appellant's first witness, however, the second witness was not available, and thus the learned judge adjourned the hearing of the case. Subsequently, the second witness informed the appellant's solicitors that he could not attend court on the next continuation date. The appellant's solicitors then wrote to court and again, requested for adjournment of the case and new trial date to be fixed. However, the request for adjournment was refused by the court. Thereafter, the claim was withdrawn by the appellant with liberty to file afresh. The learned judge allowed the withdrawal of the claim but without liberty to file afresh. Hence, the appeal. The appellant contended that the learned judge's decision was

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extremely harsh and unfair. The appellant also submitted that to grant the adjournment requested would cause no prejudice to the respondents and it was wrong for the learned judge to hold that to allow the adjournment would have allowed the appellant 'a second bite of the cherry' because at the material time the only witness called by the appellant to testified was the appellant's site manager. It was also submitted that the application for adjournment was a genuine request as the appellant's second witness could not attend court. The appellant further submitted that court in its appellate capacity could review the exercise the discretion by the learned judge if the order made resulted in injustice to one or the other of the parties to the suit.

Held, dismissing the appeal with agreed costs of RM10,000:

(1) The decision to strike off the suit or claim without liberty to file afresh upon withdrawal of the suit by the appellant was an exercise of discretion by the learned judge. Under O 21 of the Rules of Court 2012 ('the ROC') a writ action may be discontinued or withdrawn without the leave of the court against any or all defendants at any time not later than 14 days after the service of the last defence. Since the trial had commenced thus pursuant to O 21 r 3(1) the court may grant the leave with or without conditions. Order 21 r 3(2) stated that application under this rule shall be made by notice of application. There was no specific form of such notice that must be followed. A simple letter to the court and the other party of an intention to withdraw would suffice (see paras 14–16).

(2) Under O 35 r 3 of the ROC, the trial judge is given a wide discretion to grant adjournment of a case but it is not an unfettered discretion. The discretion must be exercised reasonably by taking into account relevant considerations only and guided by the established principles (see para 23).

(3) On the facts and circumstances of the case, the decision by the trial judge was justified. In fact the learned judge had already indulged the appellant with one adjournment to secure the attendance of the second witness. Nowhere in the submission or the judgment of the court was the reason why the second witness could not attend court stated. Thus, the court could only inferred that no such reason or explanation was advanced or proffered to by the appellant (see para 25).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan hakim bijaksana dalam membenarkan penarikan balik saman perayu terhadap responden-responden tanpa kebebasan untuk memfailkan semula. Perayu terlibat dalam projek untuk membina Saluran Paip Sabah-Sarawak yang telah diawardkan oleh Petronas Carigali Sdn Bhd. Sepanjang projek itu, hujan lebat turun dan Seksyen 1 projek dilanda banjir teruk yang menyebabkan kerosakan kepada

lubang gerudi dan akses batu jalan di Sungai Mengalong Crossing dan hak laluan di pelbagai lokasi dan jalan masuk di kawasan itu. Responden telah bersetuju untuk menginsuranskan perayu bagi projek itu terhadap apa-apa kerugian fizikal, kerosakan, liabiliti atau perbelanjaan dalam polisi semua risiko pembinaan di mana had liabiliti atau jumlah wang yang diinsuranskan adalah 100%. Perayu telah mengemukakan tuntutannya kepada responden bagi jumlah RM13.989 juta menurut polisi insurans. Walau bagaimanapun, responden telah menolak tuntutan perayu kerana pelaras kerugian responden Cunningham Lindsey Adjusters (M) Sdn Bhd telah membuat kesimpulan bahawa perayu tidak berhak kepada RM13,989,887 yang dituntut atau apa-apa amaun langsung oleh sebab-sebab yang terkandung dalam laporan awalnya bertarikh 8 Julai 2011 dan laporan akhir bertarikh 15 Februari 2012. Berikutan itu, perayu telah memfailkan saman terhadap responden. Pada permulaan perbicaraan, hakim bijaksana telah mendengar saksi pertama perayu, bagaimanapun, saksi kedua tidak ada, dan oleh itu hakim bijaksana telah menangguhkan pendengaran kes itu. Selepas itu, saksi kedua memberitahu peguam perayu bahawa dia tidak dapat hadir ke mahkamah pada tarikh sambungan seterusnya. Peguamcara perayu kemudiannya menulis kepada mahkamah dan sekali lagi, memohon penangguhan kes itu dan tarikh perbicaraan baru ditetapkan. Walau bagaimanapun, permohonan untuk penangguhan ditolak oleh mahkamah. Kemudian, tuntutan itu ditarik balik oleh perayu dengan kebebasan untuk memfailkan semula. Hakim bijaksana telah membenarkan penarikan balik tuntutan tersebut tetapi tanpa kebebasan untuk memfailkan semula. Justeru, rayuan itu. Perayu berhujah bahawa keputusan hakim bijaksana adalah agak keras dan tidak adil. Perayu juga berhujah bahawa untuk memberikan penangguhan seperti dipohon tidak akan menyebabkan prejudis kepada responden dan ia adalah salah untuk hakim bijaksana memutuskan bahawa untuk membenarkan penangguhan akan membenarkan perayu 'a second bite of the cherry' kerana pada masa matan satu-satunya saksi yang dipanggil oleh perayu untuk memberi keterangan adalah pengurus tapak perayu. Ia juga dihujahkan bahawa permohonan untuk penangguhan adalah permohonan sah kerana saksi kedua perayu tidak boleh hadir ke mahkamah. Perayu selanjutnya berhujah bahawa mahkamah dalam kapasiti rayuannya boleh menyemak semula pelaksanaan budi bicara oleh hakim bijaksana jika perintah yang dibuat mengakibatkan ketidakadilan kepada salah satu daripada pihak kepada guaman itu.

Diputuskan, menolak rayuan dengan kos yang dipersetujui RM10,000:

(1) Keputusan untuk membatalkan guaman atau tuntutan tanpa kebebasan untuk memfailkan semula setelah penarikan balik guaman oleh perayu adalah pelaksanaan budi bicara oleh hakim bijaksana. Di bawah A 21 Kaedah-Kaedah Mahkamah 2012 ('KM') satu tindakan writ boleh tidak disambung atau ditarik balik tanpa kebenaran mahkamah terhadap mana-mana atau semua defendan pada bila-bila masa tidak lewat

daripada 14 hari selepas penyampaian pembelaan terakhir. Oleh kerana perbicaraan telah bermula menurut A 21 k 3(1) mahkamah boleh memberikan kebenaran dengan atau tanpa syarat. Kaedah 21 k 3(2) menyatakan bahawa permohonan di bawah kaedah ini hendaklah dibuat melalui notis permohonan. Tiada borang spesifik untuk notis tersebut yang perlu diikuti. Surat yang mudah kepada mahkamah dan pihak lain tentang niat untuk menarik balik adalah memadai (lihat perenggan 14–16).

(2) Di bawah A 35 k 3 KM, hakim perbicaraan diberikan budi bicara luas untuk memberikan penangguhan untuk suatu kes tetapi ia bukan budi bicara yang tidak terbatas. Budi bicara perlu dilaksanakan secara munasabah dengan mengambil kira pertimbangan relevan sahaja dan dipandu oleh prinsip-prinsip yang ditetapkan (lihat peranggan 23).

(3) Berdasarkan fakta dan keadaan kes itu, keputusan oleh hakim bijaksana adalah wajar. Bahkan hakim bijaksana telahpun membenarkan perayu dengan satu penangguhan untuk menjamin kehadiran saksi kedua. Tiada dalam penghujahan atau penghakiman mahkamah adalah sebab mengapa saksi kedua tidak dapat hadir ke mahkamah dinyatakan. Oleh itu, mahkamah hanya boleh membuat inferens bahawa tidak ada sebab atau penjelasan yang telah dikemukakan atau ditujukan oleh perayu (lihat perenggan 25).]

Notes

For a case on leave to file fresh action, see 2(2) *Mallal's Digest* (5th Ed, 2015) para 3122.

Cases referred to

Fox v Star Newspaper Company [1898] 1 QB 636, CA (refd)
Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors [1992] 1 MLJ 51; [1991] 3 CLJ 1783, HC (refd)
Lee Ah Ba v Md Noor bin Ariffin & Anor [1990] 3 MLJ 169, HC (refd)
Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107, FC (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155, CA (refd)
United Asian Bank Bhd v Balakrishnan (t/a Balakrishnan Restaurant) & Ors [1992] 1 MLJ 587, HC (refd)

Legislation referred to

Rules of Court 2012 O 21, O 21 rr 2(1), 3(1), (2), O 35 r 3

Appeal from: Suit No 22NCC-442–06 of 2013 (High Court, Kuala Lumpur)

Kamraj Nayagam (Adam Lee with him) (Kadir Andri & Partners) for the appellant.

Ivan Loo (Loshini a/p Ramarmuty with him) (Skrine) for the respondents.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] This is the appellant's appeal (the plaintiff in the High Court) against the decision of the learned judge given on 4 July 2014 allowing the appellant's withdrawal of the suit against the respondents (the defendants in the High Court) without liberty to file afresh. The main ground for the decision is that it is an abuse of process and 'to allow the plaintiff liberty to file afresh is to give the plaintiff a second bite of the cherry' and that it 'would be an injustice' to the defendant/respondent to give the plaintiff/appellant a chance to file afresh.

BACKGROUND

[2] The undisputed facts: Petronas Carigali Sdn Bhd had awarded a project to construct the Sabah-Sarawak Pipeline Project from Kimanis, Sabah to Bintulu, Sarawak to a consortium called Punj Lloyd-Dialog-Petronab Consortium of which the appellant was one of the members.

[3] One aspect of the project involved the drilling and construction of borehole for the purpose of crossing of the pipeline across the Mengalong River. Between 23 December 2010 and 27 December 2010 there was heavy rain at several locations of Section 1 of the project. Section 1 was hit by severe floods causing damage to the aforementioned borehole and gravel access road at Sungai Mengalong Crossing and the right of way at various locations and access roads in that areas. Some of the access roads and rights of way were submerged in flood water.

[4] The respondents had agreed to insure the consortium (including the appellant) for the project against any physical loss, damage, liability or expense from the period of 6 March 2008–6 August 2011 under a construction all risks policy. The limits of liability or sums insured was 100%.

[5] Immediately after the event, on 28 December 2010 the appellant through the consortium notified Petronas of its intention to recover losses pursuant to the policy. Petronas was provided with a detailed report dated 19 December 2011 of the incident.

[6] The appellant submitted its claim to the respondents for the sum of RM13.989m pursuant to insurance policy. However, the respondents rejected the appellant's claim. It appears from the respondents' written submission that this rejection was because respondents' loss adjusters Cunningham Lindsey Adjusters (M) Sdn Bhd had concluded that the appellant was not entitled to

A the RM13,989,887 claimed or any amount at all for the reasons contained in its preliminary report dated 8 July 2011 and final report dated 15 February 2012.

B **[7]** On 21 June 2013 the appellant filed the writ and the statement of claim against the respondents. After all the preliminaries were completed, there was a case management on 5 December 2013 before the trial judge. On that day the case was set down for trial, with agreement of all parties, on two sets of dates – (i) 28–30 April 2014 and (ii) 19–22 May 2014. In the meantime there were C amendment to the pleadings by both sides. Anyway, the trial proceeded as scheduled.

[8] On 28 Arpil 2014, the trial commenced and the trial judge heard the appellant/plaintiff's first witness. The appellant's first witness was Mr Froid D Mannummal Paily (the appellant's contract manager) and he testified on 28 April 2014 and 29 April 2014. After PW1 had finished giving evidence for the appellant on 29 April 2013, the court was informed that the appellant's second witness by the name of Umang Srivastava was not available in court. He was based and still in India; but he is no longer in the employ of the appellant.

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[9] The trial judge then adjourned the hearing of the case to 19–20 May 2014, and at the same time directed the appellant to provide confirmation as to whether Umang will be attending the trial on those two dates.

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[10] On 2 May 2014 Umang, the appellant's second witness confirmed that he would be available to attend trial on the next continuation date. Thereafter appellant's solicitor informed the court accordingly and proceeded to prepare the witness statement for Umang and had filed the same in court on 5 May G 2014.

[11] However on 12 May 2014 Umang informed the appellant's solicitors that he is not able to attend court from 19–22 May 2014. The appellant's solicitors then wrote to the court and requested for an adjournment and the H trial dates fixed for 19 and 20 May 2014 to be vacated; and for new trial dates to be fixed for Umang to come and testify. But the request for adjournment was refused by the court.

[12] Thereafter by letter dated 15 May 2014 the appellant informed the I court that it will withdraw the claim since Umang is unable to attend trial on 19 May 2014, but with liberty to file afresh. Learned counsel for the respondents objected to the withdrawal with liberty to file afresh. After hearing the parties on the withdrawal issue, the learned judge made the decision that is now being appeal against.

[13] In arriving at her decision the learned judge had considered the following: A

> This suit was filed in June 2013. When the suit was filed the plaintiff knew the importance of Umang as its main witness as he was the person who was on site as well as the person having knowledge of the plaintiff's claim. If the plaintiff is given with liberty to file afresh then the plaintiff would be given a second bite of the cherry. This is a clear abuse of process of the court as the cross-examination and re-examination of the plaintiff's first witness has been completed. To allow the plaintiff to file afresh against the defendants would be an injustice. There is also no guarantee that Umang will be present at the trial. Therefore, based on the circumstances of the case and the reasons mentioned above the withdrawal of the action against the defendants is allowed but without liberty to file afresh. B C

OUR DECISION

[14] The decision to strike off the suit or claim without liberty to file afresh upon withdrawal of the suit by the appellant was an exercise of discretion by the learned judge. D

[15] Under O 21 of the Rules of Court 2012 ('the ROC') a writ action may be discontinued or withdrawn without the leave of the court against any or all defendants at any time not later than 14 days after the service of the last defence (if there are more than one defendants) – see O 21 r 2(1). In our case the trial had commenced. Thus O 21 r 2(1) was no longer applicable. The relevant rule in the circumstances was O 21 r 3(1), where leave of court was required. In hearing an application to withdraw, the court may grant the leave with or without conditions. O 21 r 3(1) reads: E F

> Discontinuance of action with leave (O 21, r 3)
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> 3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just. G H

[16] O 21 r 3(2) provides that application under this rule shall be made by a notice of application. There is no specific form of such notice that must be followed. In our view a simple letter to the court and the other party of an intention to withdraw would suffice. I

[17] Be that as it may, in this case counsel for the appellant submitted that the learned judge's decision was 'extremely harsh and unfair'. He argued that to grant the adjournment requested would cause no prejudice to the respondents.

He argued that it was wrong for the learned judge to hold that to allow the adjournment would have allowed the appellant 'a second bite of the cherry' because at the material point of time the only witness called by the appellant to testified was the appellant's site manager. He submitted that the application for adjournment was a genuine request as Umang, the appellant second witness could not attend court. He further submitted that this court in its appellate capacity can review the exercise of the discretion by the learned judge if the order made resulted in injustice to one or the other of the parties to the suit – *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107 (FC) at p 109 and *Lee Ah Ba v Md Noor bin Ariffin & Anor* [1990] 3 MLJ 169 (HC).

[18] Learned counsel for the appellant referred to us several cases on the principles to be followed in exercising court discretion whether or not to allow adjournment with no liberty to file afresh. These principles are settled and the parties have no quarrel about it. We produce the excerpts from those cases referred to us that illustrate the principles:

[19] In *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155, Gopal Sri Ram JCA (as he then was) held at p 161 as follows:

> What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O 21 r 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.
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> One of these guidelines is that if a defendant is dominus litis, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim of interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v Mann* [2000] FCA 1680.
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> The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which we have referred.

[20] In the case of *United Asian Bank Bhd v Balakrishnan (t/a Balakrishnan Restaurant) & Ors* [1992] 1 MLJ 587, VC George J (as he then was) at p 591 referred to the English Court of Appeal case of *Fox v Star Newspaper Company* [1898] 1 QB 636 which laid down the following principle:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able

to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term 'discontinuance' or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

[21] The High Court in *Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51; [1991] 3 CLJ 1783, also considered and laid down the principles in respect of discontinuance. Lim Beng Choon J, held at p 63 (MLJ); p 693 (CLJ) that:

The principles that can be extracted from the aforementioned cases are that the Court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:

(1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v Brown & Root Ltd*;

(2) the discontinuance was not made bona fide by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be dominis litis as the defendant has a perfectly good defence – see *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124; [1971] 1 LNS 101 case;

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Covell Matthews & Partners v French Wools Ltd* case.

[22] Learned counsel for the respondents submitted that we should not intervene with the exercise of the learned judge's discretion. Firstly, he submitted to allow the adjournment would cause prejudice to the respondents because the respondents would be subject to 'continuing threat' of possible future litigations on the same subject matter especially in the circumstances that there was no assurance or guarantee by the appellant as to when the appellant's second witness Umang can attend court to testify. The appellant, learned counsel submitted should have been prepared with his case.

[23] In our view it is without doubt that under O 35 r 3 of the ROC 2012 the trial judge has a wide discretion to grant adjournment of a case from time to time. But it is not an unfettered discretion. The discretion must be exercised reasonably by taking into account relevant considerations only and guided by the established principles (as laid down in the cases above).

[24] In our instant appeal the learned judge had taken into account the fact that the appellant had commenced the case against the respondents in 2013. The appellant was aware that some of its witnesses could be from India. So the learned judge was of the view that the appellant should be prepared. Moreover the learned judge noted that the appellant's second witness Umang was in India and is no longer in the service of the appellant. Thus the learned judge had doubts as to the speed or urgency with which the appellant could secure the attendance of the said witness in court.

[25] As to the contention that the decision was harsh and unfair, we are of the view that on the facts and circumstances of this case the decision was justified. In fact the learned judge had already indulged the appellant with one adjournment to secure the attendance of the second witness. In view of the amount claimed against the respondents it is reasonable for us to say that the claim was definitely of importance to the appellant. Should their claim fail the appellant stood to absorb the cost of the damage caused by the floodwater to the tune of RM13.9m which is a huge sum and could cripple a company cash flow. We also observe that nowhere in the submission or the judgment of the court was the reason why Umang, the second witness, could not attend court stated. We can only infer that no such reason or explanation was advanced or proffered to the court by the appellant. The second witness was important to the appellant. The second witness was the appellant's manager at site for the project.

[26] In the circumstances, we are of the view that the learned judge had judicially and properly exercised her discretion. Accordingly, the appeal was dismissed with agreed costs of RM10,000 to the respondents and the deposit ordered to be refunded.

Appeal dismissed with agreed costs of RM10,000.

Reported by Dzulqarnain Ab Fatar